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Watson, John Henry

In re Vermont constitution of 1777

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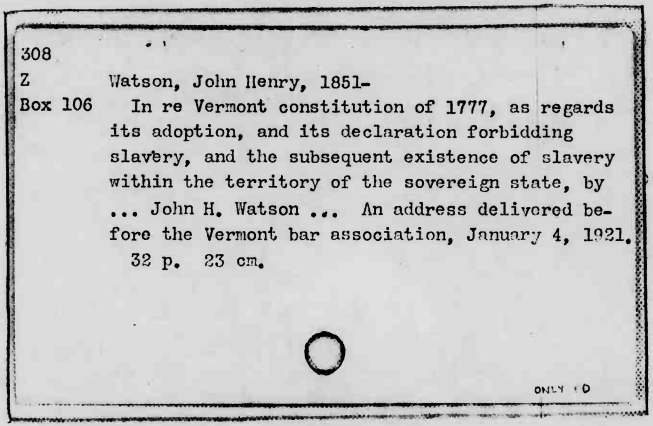

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IN RE VERMONT CONSTITUTION OF 1777, AS REGARDS ITS ADOPTION, AND ITS DECLARATION FORBIDDING SLAVERY; AND THE SUBSEQUENT EXISTENCE OF SLAVERY WITHIN THE TERRITORY OF THE SOVEREIGN STATE

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It should be stated at the outset that the investigation of the particular matters within free range of the foregoing heading, and the writing of this paper, were prompted by inquiries of more than ordinary significance in the early history of Vermont, addressed to me by a gentleman residing in Pennsylvania, who, it would seem, preparatory to writing a book dealing (to some extent at least) with the subject of slavery, is making a comparative study of its early existence in that and other states, and the priority in prohibitive effect of constitutional provisions, if any there were in such other states touching the subject. His letters indicated that, being desirous of a greater degree of accuracy respecting such matters connected with Vermont, he was seeking further information.

Because of their material bearing on what is said later, and the conclusions reached, it is deemed necessary to detail some earlier events in succeeding narration, looking toward the establishment of an independent sovereignty, with which events all readers of Vermont history are more or less familiar.

At a time before the New Hampshire Grants had assumed the title of a state, and when the only government which existed was vested, by a convention of the people, in a Council of Safety, a general convention of the several delegates from the towns on both sides of the range of Green Mountains was held at Dorset on the 24th day of July, 1776, at which it was unanimously re-

solved to take suitable measures, as soon as may be, to declare the New Hampshire Grants a free and separate district. On the 15th of January, 1777, the convention again met, and after much deliberation resolved to declare those Grants a free and independent state. A committee being appointed "to prepare a draught for a declaration for a new and separate state," reported as follows: "This convention, whose members are duly chosen by the free voice of their constituents in the several towns, on the New Hampshire Grants, in public meeting assembled, in our own names, and in behalf of our constituents, do hereby proclaim and publicly declare, that the district of territory, comprehending and usually known by the name and description of the New Hampshire Grants, of right ought to be, and is hereby declared forever hereafter to be considered, as a free and independent jurisdiction, or state; by the name, and forever hereafter to be called, known, and distinguished by the name of New-Connecticut." The declaration then proceeded with a statement of privileges and immunities to be enjoyed by the inhabitants, concluding, "And that such privileges and immunities shall be regulated in a bill of rights, and by a form of government, to be established at the next adjourned session of this convention." The convention voted "to accept the above declaration." On January 22d the convention adjourned to meet on the first Wednesday of June, and accordingly met again on that day.

Under date of April 11, 1777, Dr. Thomas Young, a distinguished citizen of Philadelphia, addressed a letter to the people of Vermont, in form: "To the Inhabitants of Vermont, a Free and Independent State, bounding on the River Connecticut and Lake Champlain." In the first paragraph of the letter Dr. Young says: "As the Supreme Arbiter of right has smiled on the just cause of North America at large, you, in a peculiar manner, have been highly favored. God has done by you the best thing commonly done for our species. He has put it fairly

in your power to help yourselves." The letter continuing, Dr. Young urged that all the freeholders and inhabitants be invited " to meet in their respective townships, and choose members for a general convention, to meet at an early day, to choose delegates for the general congress, a committee of safety, and to form a Constitution for your State"; recommending the Constitution of Pennsylvania as a model for the one to be formed for the new state, saying in conection therewith:—

"Happy are you, that, in laying the foundation of a new government, you have a digest drawn from the purest fountains of antiquity, and improved by the readings and observations of the great Dr. Franklin, David Rittenhouse, Esq., and others. I am certain you may build on such a basis a system, which will transmit liberty and happiness to posterity."

Allen's History of Vermont, printed in 1798, says: "Ira Allen printed and published a pamphlet, showing the right the people had to form a government, which, with Dr. Young's letter, were spread through the state, and measures taken to convene a convention, which met at Windsor in June, 1777, to form a constitution." At this meeting a committee was appointed to make a draft of a constitution; and a resolution was adopted, recommending to each town to elect delegates to meet in convention, at Windsor, on the 2d day of July following. This convention then adjourned to meet again on the same day as was to meet the convention of new delegates, recommended to be elected by the towns.

A better understanding of the authority conferred upon the delegates elected to the July convention is had by looking at the resolution recommending such election. By it the people were told that the Grants had been declared a free and independent state, but no government sufficient to the exigencies of their affairs had been established; that it was therefore absolutely necessary for the safety, well-being and happiness of the inhabi-

tants to form such a government as should, *in the opininon of the representatives of the people of the state,* best conduce to the happiness and safety of their constituents in particular and America in general, and that Congress had made and published "the within recommendation, for the express purpose of taking up government;" and therefore the freeholders and inhabitants of each town were thereby recommended to meet and choose delegates to attend a general convention at the time and place named, for the purpose, among other things stated, "to form a Constitution for said state." The recommendation of Congress was "to adopt such government as shall, in the opinion of the representatives of the people, best conduce," etc.

"Government is that form of fundamental rules and principles by which a nation or state is governed," which means the rules and principles embodied in the nation's or state's Constitution, and as an aggregate whole, the Constitution itself; and the delegates which should be elected to the general convention, were the representatives whose opinion was thus to be followed. The features here pointed out should be borne in mind when, presently, the authority of the delegates in convention to adopt the Constitution is being more particularly discussed.

The last named convention having met at Windsor on the 2d day of July, the draft of the constitution made by the committee appointed for that purpose by the other convention, was presented and read. In making the draft, the name of the State was changed to "Vermont." The business, being of great importance, required serious deliberation; and it was under consideration when the news of the evacuation of Ticonderoga arrived. This caused great alarm, and the convention was for leaving Windsor; but it being prevented or delayed by a severe thunder storm, the convention finished reading the constitution, paragraph by paragraph, for the last time, and unanimously adopted

it. The convention then appointed a Council of Safety to act during the recess, and adjourned.

Previous to the adjournment of this meeting, "It was ordered that the first election, under the Constitution, should be holden in December, 1777; and that the General Assembly, thus elected, should meet at Bennington, in January, 1778." But the public attention being diverted by the evacuation of Ticonderoga, and the progress of Burgoyne's invasion, "the Constitution was not printed, seasonably, to have the election holden in December." The members of the general convention were therefore summoned by the Council of Safety to meet again at Windsor on the 24th of December, 1777. The members met accordingly and unanimously agreed to postpone the day of the election until the first Tuesday of March, then next, and the sitting of the General Assembly until the second Thursday of the same month. This appears in the address of Thomas Chittenden, President of the Council of Safety, "To the Inhabitants of the State of Vermont," dated February 6, 1778, in which they were informed that the representatives of the State, in their general convention, held at Windsor, on the 2d day of July, then last, did compose, and agree unanimously, on a Constitution for the further government and mutual advantage of its inhabitants.

It is true (as suggested by my Pennsylvania inquirer) that this Constitution was not submitted to the people for their direct vote of ratification; but in this respect the course recommended by the resolution mentioned above was followed by the people: each town elected and sent its delegates to the convention, to meet at Windsor on the second day of July, following, to examine and pass upon the draft; and these delegates from the several towns assembled at the time and placed named, and adopted the Constitution presented to them by the committee to which its drafting had been intrusted, completing their labors on the eighth day of the month. The convention appointed Ira Allen to see the

Constitution printed and distributed among the people before election; all of which was done some days before. Consequent on such distribution the inhabitants had in hand accurate information of the instrument as a whole, and in detail, its provisions.

That in thus adopting the instrument as the fundamental law of the State, the delegates understood and believed they were acting within the scope of the authority with which they had been vested, what more convincing evidence can be had than that afforded by the instrument itself? May it not be allowed to speak as an ancient official public document of verity? And especially so in view of the principle that all acts done by what appears to the public authority are presumed to be rightly done, until the contrary is proved? The preamble, forming a part of that instrument, immediately preceding the declaration of rights, states:—

"We the representatives of the freemen of *Vermont*, in General Convention met, for the express purpose of forming such a government, . . . do, by virtue of authority vested in us, by our constituents, ordain, declare, and establish, the following declaration of rights, and frame of government, to be the CONSTITUTION OF THIS COMMONWEALTH, and to remain in force therein, forever, unaltered, except in such articles, as shall, hereafter, on experience, be found to require improvement, and which shall, by the same authority of the people, fairly delegated, as this frame of government directs, be amended or improved, for the more effectual obtaining and securing the great end and design of all government, herein before mentioned."

That the people understood and believed their delegates had been sent to the convention, clothed with authority to examine and adopt the Constitution as they did do, very strongly, indeed almost conclusively, appears from the fact that they, as before stated, received the instrument printed and distributed by direction of the delegates as the one they had so examined and

adopted in performance of the duties instrusted to them, and immediately proceeded to hold a general election in accordance with its provisions, without objection in the entire State,—the later objection made by representatives from one town will presently be noticed,—the organization of the government, and acts conected therewith. That there may be no doubt as to their evidentiary significance, let me invite your attention to some particulars not before mentioned. The oath or affirmation required by the Constitution to be taken by every man of the full age of twenty-one years, to entitle him to the privileges of a freeman, among the most important of which are the constitutional rights to vote, and to exercise the duties and perform the functions of public office, was as follows:—

"I.....solemnly swear, by the ever living God, (or affirm, in the presence of Almighty God,) that whenever I am called to give my vote or suffrage, touching any matter that concerns the state of Vermont, I will do it so, as in my conscience, I shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any man."

The representatives elected attended the General Assembly at Windsor, on the 12th day of March, 1778, when and where the votes which had been cast for a Governor, a Lieutenant Governor, 12 Councilors, and a Treasurer, were assorted and counted, and the persons having the majority of votes for the respective offices, were declared duly elected, Bennington being the only town that objected against the Constitution, for the want of a popular ratification of it; but, as the people and the assembly approved of the Constitution, this objection was for the moment, as it were, and soon vanished.

The several officers declared elected took and subscribed the oath or affirmation of allegiance to the State, prescribed by the Constitution, which in terms referred to the manner of ratifica-

tion. In substance it was a solemn promise to be true and faithful to the State of Vermont, and not, "directly or indirectly, do any act or thing, prejudicial or injurious to the Constitution or government thereof, as established by Convention." And in connection therewith they took and subscribed the oath or affirmation of office, prescribed in the same manner.

The acts of the people in the respects named, constitute a series of events to which may well be applied the principle that a man's previous intentions may be judged by his subsequent acts.

The mutual understanding and belief of the people and their delegates, as to the power conferred upon the latter, being as stated above, it can not be said that the act of the latter, adopting the Constitution, was unauthorized, without impliedly saying that the power so to do could not be delegated; for the principle that he who acts through another acts through himself, is a maxim of such general application that it may be said to apply in this instance if the nature of the power was such that it could be exercised by delegation.

In considering this matter, let us not forget that all actions taken by the inhabitants of the New Hampshire Grants, declaring the territory within the Grants to be a free and independent State, and in forming and adopting a Constitution as a basis of independent government, were wholly revolutionary in character. Such actions had to be taken, if at all, without any mode of procedure being prescribed by a legislative body, for no such body existed in the Grants. In these circumstances, the validity, or even propriety, of their actions is not necessarily to be tested by the rules which usually obtain in an already existing government, having a legislative body which, in the performance of its proper functions, may direct the course to be followed, in submitting a proposed new constitution, or amendments, to the people for ratification.

It would seem that in the early period to which this inquiry relates, the ratification of such an instrument by the people, acting in that behalf through their delegates chosen for such purpose, in convention assembled, was deemed effective, and sufficient to give it the same binding force as it would have, had it been directly voted upon affirmatively by the people themselves. No other hypothesis suggests itself, so reasonably explaining the action of each of the thirteen original states, or incipient states, except Massachusetts, prior to the conclusion of the Revolution, by treaty of peace with England, in not submiting its first Constitution for ratification by the popular vote. In the case of the Constitution of Vermont, the manner of submitting it was determined by the people themselves. Though it is true that they were in each town, recommended by the general convention to elect delegates to meet in covention on the day named, which was approximately a month ahead, to pass upon the draft presented by the committee appointed to make it, the people were at liberty to accept or reject this recommendation, and their action in this respect was final. They elected delegates to assemble in convention as thus recommended; by reason whereof their assent to that mode of passing upon the draft is implied, and that instrument when thus passed upon, was an obligation complete in itself, and binding on the people as of their own act of adoption.

The case of M'Culloch v. Maryland,[1] decided by the Supreme Court of the United States in 1819, involved the question whether the State of Maryland could impose a tax on a branch of the United States Bank located in that state. The defendant state denied the obligation of a law enacted by Congress, and the plaintiff, on its part, contested the validity of an Act which had been passed by the legislature of Maryland. Chief Justice Marshall, (who is recognized as standing in history without a

1. 4 Wheat. 316.

peer as a judge of the law of written constitutions,) speaking for the court, stated: "The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of the members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government." The court was asked, in the construction of the Federal Constitution, to consider that instrument not emanating from the people, but as an act of sovereign and independent states, claiming in argument that the powers of the general government are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. In answer thereto the great Chief Justice said it would be difficult to sustain this position; that the convention which framed the Constitution was elected by the state legislatures; but the instrument when it came to their hands was a mere proposal, without obligation, or pretentions to it; that it was reported to the then existing Congress of the United States, with a request that it "be submitted to the convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification"; that this mode of proceeding was adopted; and by their convention, by Congress, and by the state legislatures, the instrument was submitted to the people; that they acted upon it in the only manner in which they could act safely, effectively, and wisely, on such a subject, by assembling in convention in their several states; but the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments; that from these conventions the Constitution derives its whole authority; that the assent of the states, in the sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people; but the people were at perfect liberty to accept or

reject it, and their act was final; that the Constitution, when thus adopted, was of complete obligation, and bound the state sovereignities; that the government of the Union is, emphatically, and truly, a government of the people, in form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit.

It is seen from what is there said by way of discussion, and rulings made, that the determinative question on that branch of the case was, whether there was a ratification of the Federal Constitution by the people of the states forming the Union, as contradistinguished from the states as such; for if there was, it logically followed that the government of the United States emanated from the people, and, though one of enumerated powers, it is supreme within its sphere of action.

Of the holdings in that case, the ones particularly important in discussing the matters within the scope of this paper, are those that submitting the Constitution to the convention of delegates chosen in each state by the people, for the purpose of assenting to and ratifying it, was in legal effect submitting it to the people; and the action upon it by the delegates so assembled in convention, was the action of the people themselves; because those holdings serve as a safe rule for the determination of the binding effect of the similar submittal of the draft of the Vermont Constitution to the convention of delegates elected by the people, and the action upon it by the delegates so assembled in pose of examining and giving formal approval to that instrument. The fact that the people, in electing delegates, acted in township units, rather than in state units as in the instance involved in M'Culloch v. Maryland, is immaterial. Confining ourselves in this respect, as we should, to the material facts, namely, the assent of the people that the draft be submitted for examination and approval, to their representatives chosen for that particular purpose, in convention assembled, followed by such submission

to, and approval by, that representative body, they are sufficiently analogous to bring them within the same governing principle. And by parity of reasoning, it follows that when the Vermont Constitution was submitted to the convention of delegates, and by them adopted, it was in law a submittal of it to the people, and the adoption of it by those delegates in convention, was an adoption by the people themselves, and was obligatory on them as much.

Although my views in this respect seem to be somewhat contrary to those set forth by Mr. Slade in his State Papers, they are in harmony with those expressed by the Rev. Pliny H. White, a former President of the Vermont Historical Society, in his address delivered before that Society on July 2, 1863.

They are also in harmony with what seems to have been the understanding of Vermont's great jurist, statesman, and diplomat, Edward J. Phelps, than whom—it is safe to say—no one had greater knowledge of the early history of the state, nor greater knowledge of the import of rulings made by the Supreme Court of the United States, on questions pertaining to written constitutions, and constitutional law. In his masterly oration, delivered at Bennington, on August 19, 1891, at the Dedication of the Bennington Battle Monument, Mr. Phelps told of the appointment of a committee in June, 1777, to draft a constitution, and in connection therewith stated, without qualification, that, "In July following, the Constitution was ratified, ..." In making this positive and unqualified assertion, he must have had in mind the ratification through the delegates in convention, for sure it is, no other then took place.

Support to Mr. Slade's views is found in some of the early histories of the State, by which we are given to understand that contemporaneously with the establishment of the State government and for a time thereafter, doubt existed in the minds of some of the inhabitants respecting the binding force of the Con-

stitution, it not having been ratified by popular vote, and the action of the General Assembly in the years 1779 and 1782, providing in enactments that the constitution as established by general convention in 1777, together with amendments thereto, should be forever considered, held, and maintained as part of the laws of the State, is mentioned as attempts of the Legislature to breathe life into that instrument.

Since such doubts and opposite conclusions were formerly (at least) more or less entertained, let us consider what effect, if any, the want of a ratification by direct vote of the people had on the Constitution, assuming that the delegates in convention were not previously authorized to adopt it. It seems to me, and I shall undertake to demonstrate, that it became effective and legally operative as of the time when it was adopted by the convention of delegates, in July, 1777, by subsequent acquiescence.

In addition to what has already been observed, let me state from the records, in short, that the State government, in its different branches, from its immediate organization under the Constitution, continued to function regularly pursuant thereto as adopted by the general convention in 1777, or as amended at the end of successive periods specified in, and in the manner pointed out by, that instrument itself. Amendments were adopted in 1786, the end of the first period,—not until then did the Constitution declare separate and distinct the three co-ordinate departments of government,—again in 1792, the end of the second period, and at different times later; but the organic law of the State has always been that adopted by the convention in 1777, changed only by amendments made in accordance with its own provisions, and under it the State maintained its existence for the first thirteen and two-thirds years, and until its admission into the Union (March 4, 1791), in all respects as a sovereign and indepedent power.

Taking such a premise, the acts by which this Constitution

was established were acts of the highest sovereignty, and the instrument thus adopted acquired its binding force by reason of the approval of the people, with full knowledge of its provisions and of its adoption by their delegates in the convention, manifested by their immediate assent and subsequent acquiescence, in their acts to which attention has been called, all, under and in accordance with the provisions of that instrument as the organic law. In a case[2] decided by the highest court in the State of Virginia, in 1793, Judge Nelson said: "It is confessedly the assent of the people which gives validity to a Constitution. May not the people then, by a subsequent acquiescene and assent, give a Constitution, under which they have acted for seventeen years, as much validity, at least *so long as they acquiesce* in it, as if it had been previously expressly authorized." Judge Roane said: "This convention was not chosen under the sanction of the former government; it was not limited in its powers by it, if indeed it existed, but may be considered as a spontaneous assemblage of the people of Virginia, under a recommendation of a former convention, to consult for the good of themselves, and their posterity. They established a bill of rights, purporting to appertain to their posterity, and a Constitution evidently designed to be permanent. This Constitution is sanctioned by the consent and acquiescence of the people for seventeen years." The other three judges who sat in the case declared themselves to the same effect.

Such an assent and subsequent acquiescence constituted a ratification of the action of the convention in adopting the Constitution of Vermont, which had a retrospective effect, and was equivalent to a prior command, or authorization.[3]

The (so called) attempts of the Legislature, before noticed, to legalize the Constitution, by making it part of the laws of the State, added nothing to it, by way of life, force, or effect. It

2. Kamper v. Hawkins, 1 Va. Cas. 20.
3. Broom's Legal Maxims, *867.

has been well said: "A Constitution is that by which the powers of government are limited. It is to the *governors*, or rather to the departments of *government*, what a *law* is to individuals—nay, it is not only a *rule* of *action* to the branches of government, but it is that from which their existence flows, and by which the powers, (or portions of the right to govern,) which may have been committed to them, are prescribed—it is their commission—nay, it is their creator."

In Slade's State Papers, on page 288, is a note referring to the action of the Legislature of 1779, stating: "The Constitution, if it was anything, was, already, the fundamental law of the State, possessing authority, necessarily paramount to any act of the Legislature,—the very charter, indeed, of its existence, and by which alone, it was invested with power to legislate at all;—and yet we here find the Legislature gravely attempting to give to this instrument *the force of law!*"

Different explanations have been advanced for such action by the Legislature; but the most reasonable one is that suggested by the Rev. Pliny H. White in his address mentioned. Stated in a few words it is, that the people of the times were probably conversant with the laws of England, whereby Parliament (in the language of Blackstone) "can change and create afresh even the constitution of the Kingdom," "and what the Parliament doth, no authority upon earth can undo." The first volume of Blackstone was published in England in 1765, the other volumes appearing within the next four years. In Hammond's edition, ix. we are told that, "There is an abundant evidence of the immediate absorption of nearly twenty-five hundred copies of the commentaries in the thirteen colonies before the Declaration of Independence." Besides, an edition of that monumental work was published in Philadelphia in 1771-72. The American doctrine that the written constitutions of this country are paramont to any law passed by a legislative body within the same govern-

mental jurisdiction, with power in the judiciary so to declare in case of conflict between them, had not been judicially announced at the time when the Legislature undertook to legalize the Constitution as before stated, and consequently it was not generally in the minds of the people. In such circumstances, is it altogether unlikely that the General Assembly may have looked upon the enactments of 1779 and 1782, in the respects named, as not without force? Whatever the true explanation may be, nothing more need be said to convince a reasonable mind that, as affecting the Constitution, such enactments were mere nullities.

But we are not without a declaration of the Supreme Court of Vermont, having great weight on, and in some respects decisive of, the matters under discussion, though not involving directly the legal sufficiency of the adoption of the Constitution. A case,[4] before the Court in 1802, was brought to recover for the support of an aged colored person who (plaintiffs alleged) was defendant's slave, purchased by a regular bill of sale.[5] The Court considered the plaintiffs' cause of action was shown in their specification which stated that on the 26th of July, 1783, the defendant purchased of one White, Dinah, a negro slave, whom he brought into the town of Windsor. The bill of sale being offered in evidence by plaintiffs, an exception was taken to its being read to the jury. Thereon the Court said: "The question must turn upon the validity or operative force of this instrument *within this State*. If the bill of sale could by our Constitution operate to bind the woman in slavery when brought by the defendant to inhabit within this State, then it ought to be admitted in evidence; and the law will raise a liability in the slaveholder to maintain her through all the vicissitudes of life; but if otherwise, it is void.

"Our State constitution is express, no inhabitant of the State

4. Selectmen of Windsor v. Jacob, 2 Tyler, 192.
5. An asserted true typewritten copy of that bill of sale, is now among the collections of the Vermont Historical Society.

can hold a slave; and though the bill of sale may be binding by the *lex loci* of another state or dominion, yet when the master becomes an inhabitant of this State, his bill of sale ceases to operate here." It was further said by the court that the question was not affected by the Constitution or laws of the United States; that it depended solely upon the construction of our State constitution, as operative upon the inhabitants of the State; and as it does not admit of the idea of slavery in any of its inhabitants, the contract which considers a person inhabiting the State territory as such, "must be void." It was held that the bill of sale could not be read in evidence, and the plaintiffs were nonsuited.

It will be noticed that the decision was based on the Constitution as adopted in 1777, before any further action was had concerning it. This quite conclusively shows that the Supreme Court then understood that that instrument constituted the organic law of the State, and was acting on it as such.

Further reference will be made to that case as "In re Dinah."

It is true that the groundwork of the Vermont Constitution as adopted in 1777, was the Pennsylvania Constitution of 1776, recommended, as before observed, by Dr. Young as a model; yet the Vermont Constitution was not a mere copy of the Pennsylvania model. Many important changes were made; but for the purposes of this paper only one need be particularly noticed.

Article I. of the Declaration of Rights, made a part of the Vermont Constitution, reads: "That all men are born equally free and idependent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one years, nor female, in like manner, after she arrives to the age of eighteen

years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like."

The forepart of the foregoing Article, (down to and including the period immediately after the word "safety,") is like the whole of Article I. of the Declaration of Rights, made a part of the Pennsylvania Constitution. But by the latter part of Article I. of the Vermont Declaration of Rights, slavery was prohibited, a prohibition not touched upon, nor contained in, the Pennsylvania instrument.

My attention is called to the fact that the wording of this prohibitive clause is that no person, "born in this country, or brought from over sea, *ought to be holden,* by law to serve any person, as a servant, slave," etc. (The italics are mine, used to direct attention to those particular words). The words "ought to" were used; not "shall", a word generally understood, perhaps, as more positive. But as there used, the word "ought" has the significance of to be bound in duty or by moral obligation,[6] and is not directory, merely, but mandatory. This, in effect, was held by the Supreme Court in the case In re Dinah. Had that clause been merely directory, the bill of sale would not by reason thereof have been invalid in Vermont; for a provision in a statute or Constitution, considered as a mere direction or instruction, is of no obligatory force, and involves no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed. Adverting to the quotation before given from the opinion, it will be seen that the question of the validity of the bill of sale was made to turn on whether it "could by our Constitution operate to bind the woman in slavery when brought by the defendant to inhabit within this State." If it could so operate, it was valid and the defendant was liable for the maintenance of the woman as his slave; but if

6. See Webster's New International Dictionary.

it could not so operate, it was void, and the defendant not liable. That this was understood by the court to involve the question as to whether the clause in question was directory merely, or mandatory, clearly appears from the holding that "our State Constitution is express, no inhabitant of the State can hold a slave; . . . when the master becomes an inhabitant of this State, his bill of sale ceases to operate here." And in this connection, notice the further holding, of unmistakable import, that, as the Constitution does not admit of the idea of slavery in any of the State's inhabitants, the contract which considers a person inhabiting the State territory as a slave, "must be void." These propositions, pertaining to the construction of the organic law, were necessarily involved in the determination of that case, and consequently they are of the doctrine of the case for which the decision is authority.[7]

This course of reasoning unerringly leads also to the conclusion that the court must have held the slavery clause to be self-executing; for it could not have been operative, as there held, unless, in addition to being mandatory, it was self-executing. At the time the negro woman was brought into the State (July, 1783), the time deemed material in the consideration and determination of the constitutional question there involved, no statutory provision touching the question of slavery had been enacted; nor was any legislation necessary to carry the prohibitive clause in the Constitution into effect. It was complete in itself, and needed no legislative action to put it in force. This is consonant with the general understanding of courts of last resort, that prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void.[8] A prohibition, like the one in question, is a protection against an

7. Derosia v. Ferland, 83 Vt. 372, 76 Atl. 153.
8. See Willis v. Mabon, 48 Minn. 140, 31 A. S. R. 626; Beard v. City of Hopkinsville, 95 Ky. 239, 44 A. S. R. 222.

invasion of one of the most fundamental rights of a freeman, the rights of personal liberty—freedom of the person from restraint, except by due process of law. But only private rights are safeguarded by a clause of this nature, and for the infringement of such rights the common law furnishes appropriate remedy, in the absence of one expressly given by the constitution or statutes.[9]

It is not my purpose at this time to examine into or attempt to state the result of a comparative examination of the Constitution of Vermont with the Constitutions or statutes of other states, touching the priority of prohibition of slavery by law, either organic or statutory. I am only undertaking to demonstrate that, according to the determinations of courts of last resort, and by the proper application of well established rules pertaining to judicial interpretation, the Constitution of Vermont became legally effective, as such, at the time of its adoption by the delegates in general convention in July, 1777, and that the clause prohibiting slavery was mandatory and self-executing, and consequently it became operative contemporaneously with the adoption of the instrument in which it was contained, with the resultant effects.

If the demonstration given proves to be successful, it will establish only what would seem to have been generally believed by the people of the State in the years immediately succeeding the organization of the new government. By the Constitution as adopted in 1777, and until amended in 1836, the whole legislative power was vested in a House of Representatives of the freemen of the State, consisting "of persons most noted for wisdom and virtue, to be chosen by ballot by the freemen of every town in" the State. In 1786 the Legislature, composed of such persons so chosen, passed an Act entitled "An Act to prevent the sale and transportation of Negroes and Mulattoes out of this

9. See Swift & Co. v. City of Newport News, 105 Va. 108, 3 L. R. A. (N. S.) 404.

State." The terms of the enactment, including its preamble, are so convincing in the direction named above, that we set them forth in full:—

"Whereas, by the constitution of this State, all the subjects of this commonwealth, of whatever colour, are equally entitled to the inestimable blessings of freedom, unless they have forfeited the same by the commission of some crime; and the idea of slavery is expressly and totally exploded from our free government.

"And whereas, instances have happened of the former owners of negro slaves in this commonwealth, making sale of such persons as slaves, notwithstanding their being liberated by the constitution; and attempts been made to transport such person to foreign parts, in open violation of the laws of the land.

"Be it therefore enacted, & c. that if any person shall, hereafter, make sale of any subject of this State, or shall convey, or attempt to convey, any subject out of this State, with intent to hold or sell such person as a slave; every person so offending, and convicted thereof, shall forfeit and pay to the persons injured, for such offence, the sum of one hundred pounds, and cost of suit; to be recovered by action of debt, complaint, or information."

No one knew better than those men of "wisdom and virtue" then constituting the legislative body, that no act had before been passed by the Legislature touching the matter of slavery in the State; and no one knew better than they that slavery could not have existed in the State since the adoption of the Constitution, because of the mandatory and self-operating nature of the prohibitive clause therein. Indeed, in view of the recitals in, and the provisions of, the Act by them passed, it can not be doubted that the enactment was based on the known existence of such fundamental self executing mandate.

But it may be said that the first census of the United States, taken in 1790 by States, gives the number of slaves in Vermont as 16. So it does. This appears on page 8, of the book entitled, "Heads of Families at the First Census of The

United States taken in the year 1790, Vermont." The book was published at the "Washington Government Printing Office, 1907." Yet in thus giving the number of slaves in Vermont, it makes reference to Note 1, at the bottom of the page, in which it is stated: "The census of 1790, published in 1791, reports 16 slaves in Vermont. Subsequently, and up to 1860, the number is given as 17. An examination of the original manuscript returns shows that there never were any slaves in Vermont. The original error occurred in preparing the results for publication, when 16 persons, returned as 'Free colored,' were classified as 'slaves.'"

It is certain that this great and (seemingly) inexcusable mistake has been the basis of misstatements innocently made by some writers in later years, in giving the number of slaves in Vermont in the early years of her sovereign existence. Are we not justified in saying that the statement in the note, calling attention to the error and correcting it, being inserted in a governmental publication for that purpose, should be considered as officially authorized and treated as conclusive of the facts therein set forth?

This, however, does not cover the period of the existence of Vermont as an independent sovereign State, prior to the time of the first census. Yet, when taken with the nature and operative force of the slavery clause in the organic law, the fact that at the latter time there were no slaves in Vermont, but were 16 "Free colored" persons, is a very cogent circumstance bearing on the question of whether or not any slaves existed therein during the preceding period mentioned. How long had those 16 free colored persons then been residents of Vermont? and, if they were ever slaves, when and by what means did they become free? From the discussion already had of the judicial holdings in the case of In re Dinah, it is manifest that whether they were owned as slaves in the territory when, by the adoption of the Constitution, it became the State of Vermont, or were subsequently

brought as such to inhabit within the State, the clause of that instrument prohibiting slavery, *proprio vigore,* not only set them free *instanter,* so as to be entitled to protection in the enjoyment of life, liberty and property, but rendered the existence of slavery within the territorial limits of its power, legally impossible.

This course of reasoning serves to make plain the declaration of the court in the case to which reference is made in the preceding paragraph, that as the Constitution of the State does not admit of the idea of slavery in any of its inhabitants, a contract which considers a person inhabiting the State territory as such, must be void. It also shows the accuracy of the statement made in Encyclopedia Britannica, (9th Ed.,) in the Article on the History and Constitution of the United States, Volume 23, at page 752, where in speaking of slavery in this country, and the abolition of it in the Northern States, that "Vermont had never allowed it."

It should seem that no further argument or discussion ought to be necessary to establish the fact that no slaves ever existed in Vermont, either as a wholly independent sovereignty or as a State of the Union, statements to the contrary, if any, notwithstanding. Nor is this fact militated against by possible instances (if such existed) of personal restraint of one individual in the service of another. A slave, says Webster, is "a person held in bondage to another; . . . one whose person and services are under the control of another as owner or master." To be held in bondage to another is the state or quality of being bound to another without powers of choice and action; and one person cannot be so bound to another, except it be by positive law recognized as existing in the territorial jurisdiction. Nor can the person and services of one individual be under the control of another as owner or master, except the owner or master be independent of the relations of the family, and sanctioned by law. It is therefore certain that no personal restraint, assaults, or

appropriation of services, operated to reduce the individual to a condition of slavery; and such bondage or control as is essential to that condition, could not possibly exist against the inherent power of action of the declaration of rights, by which the air of Vermont was made "too pure for a slave to breathe in."

The extent of the inhibition against slavery is yet to be discussed. Recurring to Article I. of the Declaration of Rights, it will be seen that the clause touching slavery makes no distinction of race, class, or color. Within its safeguards stand alike the individuals of every race, of every color,—as well the Africans as the Italians, or the Anglo-Saxons. After declaring that all men are born equally free and independent, having certain natural, inherent and unalienable rights, including (in short) that of life, liberty, and property, the language is: "Therefore, no male person . . . . ought to be holden by law, to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts," etc.

The Constitution nowhere defines the meaning of the words, "servant," "slave," or "apprentice." In this respect, therefore, it must be interpreted in the light of the common law, with the principles of which the framers of that instrument are presumed to have been familiar. Chancellor Kent, in his Commentaries on American Law,[10] in treating of the general relation of master and servant, subdivides the kinds of persons who come within the description of servants, as slaves, hired servants, and apprentices. The definition of the word "slave" has hereinbefore been given. The term "hired servant" means one who is bound by contract to render service to the master, for which the latter is to pay the stipulated consideration. An "apprentice" is a person who is

10. Volume 2, Lect. 32.

bound by contract to serve the master for a term of years, the primary object of the contract being that the apprentice shall be taught some trade, art, profession, or business, in which the master is obligated to instruct him. In this connection it is interesting to note that by Chapter II. section 33, of the Constitution, "every freeman, to preserve his independence (if without a sufficient estate) ought to have some profession, calling, trade or farm, whereby he may honestly subsist."

By implication, minors legally bound as hired servants or as apprentices, are, until they arrive at the age of majority, subject to such duties to, and restraints by, their masters, as are incident to such relation. But under the clause in question, beyond what is so incident, such servants and apprentices are not deprived of the right of personal liberty, nor of the right to acquire and own property, derived from sources or by means not conected with their duties to the master. Respecting rights of property and the constitutional protection thereof, their standing is not dissimilar to that of a minor under the relation of parent and child, stated below.

At common law the age of majority is the same in both sexes, twenty-one years. But Article I. of the Declaration of Rights has always been considered as fixing the age of majority of females as eighteen years, and in like manner it should be considered as fixing that of males as twenty-one years. At common law it is the duty of the father to support his minor children, if he be of ability. It is also his duty (of imperfect obligation) to educate them in a manner suitable to their situation and calling. And in consequence of such obligations on the part of the father, he is entitled to the custody of the persons of his minor children, and to the value of their services; but this gives the parent no right or control over the children's property, derived from other sources or by other means, it being held by them in their own

right, and as such is protected by the constitutional guarantees pertaining to private property.

By Chapter II. section 40, of the Constitution as adopted, "A school or schools shall be established in each town, by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; . . ." And by section 41, "Laws for the encouragement of virtue and prevention of vice and immorality, shall be made and constantly kept in force; and provision shall be made for their due execution." Although there have been some changes in the wording, these two provisions have hitherto remained substantially the same.

The authority of the parent, or of a person standing in the place of a parent, however, does not go to the extent of permitting him, by contract or otherwise, to place his minor children, or children within his charge, in slavery during minority, a condition which recognizes no right of personal liberty, nor right of acquiring and owning property, regardless of its derivative source or means. The acquisitions of property by a slave belong to his master. The Supreme Court of the United States has said: "The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution."[11] That slavery is odious and against natural right, and cannot exist except by force of positive law which, "in this connection, may be as well understood customary law as the enactment of a statute," is clearly shown by the opinion

11. Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836.

of Chief Justice Shaw of Massachusetts, delivered in a case before the highest court of that state.[12]

Again adverting to the address delivered by the Rev. Pliny H. White, in speaking of slaves in Vermont, he said "it will be noticed that the Constitution did not emancipate any until they arrived at the age of twenty-one." It may be admitted that this statement made by him is within the words of the Constitution, and yet it is not within its operation if there be something in such literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception. This is in accordance with the views expressed by the great Chief Justice, speaking for the Court in the famous Dartmouth College case.[13] The true construction of the slavery clause at the beginning is the true construction now. Its language remains the same, its meaning remains the same. Therefore, if the Constitution at the time of its adoption permitted persons in the State to be held as slaves until they arrived at the age of majority, such was its operative effect thereafter for almost a century,[14] and until by the Thirteenth Amendment to the Federal Constitution, December 18, 1865, slavery and involuntary servitude were abolished in the United States and all places subject to their jurisdiction. And it would necessarily follow that the prohibition against slavery, contained in the Constitution of Vermont, never had any application to persons (of whatever race or color) thus held, so long as they remained under that age; that during such time and within the period prior to the general abolishment of slavery throughout the national domain, they did not come within the declared elementary principles "That all men are born equally free and independent," and have the natural, inherent, and unalienable rights of "enjoying and defending life and liberty;

12. Commonwealth v. Aves, 18 Pick. 193.
13. 4 Wheat. 519, 4 L. ed. 629.
14. South Carolina v. United States, 199 U. S. 448, 50 L. ed. 261.

acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety"; that within such period they were not safeguarded by the provisions of Article IX. "That every member of society hath a right to be protected in the enjoyment of life, liberty and property." In the latter connection, "society" has been defined as "an entire civilized community, or a body of some or all such communities collectively, with its or their body of common interests and aims." And it has been said by one of the greatest statesmen this country has produced, "Man is so constituted that *government* is necessary to the existence of society, and society to his existence, and the perfection of his faculties."

Nor did such persons within their years of bondage have the right to the common educational advantages guaranteed by the organic law to the youth of the State. This guaranty is founded upon the incontrovertible belief that a general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people under a Republican Form of Government where the sovereign power is in the people, and where, in theory, all citizens (within limitations as to age and residence) have a voice in the exercise of such power, and in the management of public affairs in general.

All the aforementioned rights by which persons in slavery had not protection, are basic principles of the fundamental law of the State; and yet when such persons reached the age of majority, rising from their previous degraded condition, utterly ignorant and unfit for the exercise of the common functions of citizenship, without property by inheritance or otherwise, and without (in the words of the Constitution) "some profession, calling, trade, or farm, whereby he (they) may honestly subsist," they became freemen of the State, having the same standing before the law as those who had had the benefit of the rights and

advantages guaranteed by the organic law to all persons within the realm of its power.

When we think of this condition of part of the people of the State as constant for well-nigh the first century of its sovereign existence, can we fairly and reasonably come to any conclusion other than that a construction of the clause (of the Constitution) permitting it, is so repugnant to the general spirit of that instrument as to justify a construction making it an exception? The spirit of the Constitution, collected from its words, is to be respected not less than the letter. Manifestly, this was the construction given by the General Assembly in 1786, when it was stated in the preamble to the Act noticed herein, that "Whereas, by the Constitution of this State, all the subjects of this Commonwealth, of whatever color, are equally entitled to the inestimable blessing of freedom, unless they have forfeited the same by the commission of some crime, and the idea of slavery is expressly and totally exploded from our free government." This was a contemporaneous construction of the Constitution by the Legislature, and is in itself entitled to great weight; and when it is remembered that in reaching the decision in the case of In re Dinah, the Supreme Court of the State—tacitly acquiescing in and accepting as correct such contemporaneous construction by the Legislature—declared itself to the same effect, in equally positive and unqualified terms,—which decision has now stood for more than a century without criticism,—it should seem that such construction ought to be considered as conclusively established.[15]

There can be no doubt, therefore, that, rightly understood, the prohibitive clause is subject only to such common-law limitations and restrictions as are incident to the relation of master and hired servant, and of master and apprentice, except as bound

15. State v. Stimpson, 78 Vt. 124, 62 Atl. 14; Pollock v. Bridgeport Steamboat Company, 114 U. S. 411, 29 L. ed. 147.

by the conset of the latter after ariving at the age of majority, or bound by law for the payment of debts, damages, fines, costs, or the like; and that by the self-operative force of that clause, all persons in slavery, within the State, irrespective of age, were immediately freed from bondage, and in like manner slavery in the State thereafter rendered legally impossible.

In writing this paper, no attempt has been made to give the questions an exhaustive discussion; but the aim has been to reach conclusions based on facts concerning which there seems to be no material difference as historically recorded, and on well understood principles of law. If the result is to make reasonably clear some of the questions on which doubts have heretofore existed, or as to which there has been a misunderstanding, the labor expended will not have been in vain.

We love Vermont. We are proud of her history. Though small in area, her efforts have been great, her deeds, mighty. May histories yet to be published give her credit where credit is due, accurately, and in full measure!

END OF
TITLE